

**Leshner Corporation and Nellie Boyd, Case 9-CA-14872**

February 11, 1982

**DECISION AND ORDER**

BY CHAIRMAN VAN DE WATER AND  
MEMBERS FANNING AND ZIMMERMAN

On March 24, 1981, Administrative Law Judge George Norman issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge only to the extent consistent herewith.

The complaint alleges that Respondent, through its supervisor, Larry Lewis, discharged Charging Party Nellie Boyd on September 26, 1979,<sup>1</sup> because she threatened to file a grievance under the collective-bargaining agreement then in effect at Respondent's plant.<sup>2</sup> Boyd had called in sick on September 25, but on the morning of September 26 employee Mary Shirley, a union shop steward, told Lewis that Boyd had been at a union meeting the previous evening, and that Boyd had been drunk. Lewis thereupon called Boyd and her sister, Bea Miranda, into his office to discuss Boyd's absence from work the previous day; Miranda was president of the Union Local at the time. In the course of the discussion, Boyd told Lewis that he was harassing her and discriminating against her and that she was going to file a grievance. Boyd claims that at that time Lewis fired her, but Lewis denies this.

Following this meeting, Boyd returned to the shop floor. She then approached her steward, Maggie King, to obtain forms for filing a grievance. Lewis went into the plant a few minutes after the interview in his office. He testified that he then overheard Boyd say, "That mother f— son of a b— is not going to get away with it," and that at that point he discharged her. The Administrative Law Judge did not credit Lewis' testimony in this respect, nor that of Respondent's corroborating witness, employee Gerney Rutherford; rather, he credited the testimony of Boyd, Miranda, and two other employee witnesses for the General Counsel,

all of whom denied that Boyd had said any such thing.

The Administrative Law Judge concluded that Boyd had not been insubordinate and that she was not discharged for her absenteeism.<sup>3</sup> Because Respondent's proffered explanation for the discharge was thus found pretextual, the Administrative Law Judge concluded that Boyd was "discharged for her union activity and because she attempted to file a grievance" against Lewis.<sup>4</sup> We disagree.

The Administrative Law Judge's conclusions are based on his resolutions respecting the credibility of witnesses, to which Respondent excepts. It is our established policy not to reverse an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that those resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and have decided to reverse certain of the Administrative Law Judge's findings herein with respect to credibility.

The Administrative Law Judge implicitly credited the testimony of Boyd and Miranda that Lewis told Boyd in his office that she was discharged. Lewis claimed that Boyd was not discharged then, but later on the shop floor, when she spoke about Lewis in an obscene manner.<sup>5</sup> The Administrative Law Judge did not allow cross-examination of the General Counsel's witnesses on the issue of when the discharge occurred, ruling that the sequence of events was irrelevant. We find that the sequence was manifestly relevant and that the Administrative Law Judge improperly excluded evidence on this question. Moreover, we also find the General Counsel's witnesses' version of events extremely improbable.

We find that Lewis had no apparent motivation for discharging Boyd because she threatened to file a grievance. Respondent and the Union enjoyed a longstanding collective-bargaining relationship and the filing of employee grievances under it was routine. Boyd herself had filed grievances in the past without reprisal. She had also recently circulated a petition to have the Union replaced by another union. There is no evidence that Lewis harbored

<sup>3</sup> Respondent gave Boyd a letter stating that she was discharged for "absenteeism and insubordination." According to Lewis, the personnel office advised him that Boyd had the "worst record" on absenteeism.

<sup>4</sup> The Administrative Law Judge refers at fn. 8 to other activity by Boyd, especially internal union activity aimed at ending what Boyd considered a "sweetheart" relationship between Respondent and the Union. However, the Administrative Law Judge does not elaborate on how this activity motivated Lewis to discharge Boyd.

<sup>5</sup> The Administrative Law Judge notes that Boyd's language might have been meant for Mary Shirley, who had reported to Lewis her alleged conduct at the union meeting. We find that Lewis reasonably believed the remark referred to him.

<sup>1</sup> All dates hereinafter are in 1979, unless otherwise indicated.

<sup>2</sup> Respondent's employees at its Hamilton plant are represented for purposes of collective bargaining by Amalgamated Clothing and Textile Workers Union and its Local 148-T, hereinafter the Union.

any animus against Boyd or her activities. Rather, it appears that Lewis was being lenient with Boyd, even on September 26. Thus, when he had received information that cast some doubt on Boyd's claim that she had been sick the previous day, he did not discharge her, although under the collective-bargaining agreement he could have.<sup>6</sup> Rather, he gave her a verbal warning and another chance.

Moreover, the testimony of Boyd and Miranda indicates that neither was distinguishing between a threat of discharge, conditioned on another event (as in, "Next time you're absent without a doctor's excuse, you're fired"), and an actual discharge. The Administrative Law Judge did not address this ambiguity, although it appeared several times in the testimony. This suggests that Lewis testified accurately that he warned Boyd that she would be discharged, but that he did not discharge her during the meeting in his office on September 26.

The testimony of Boyd and Miranda was filled with unlikely claims on collateral issues. Both attribute extreme statements to Mary Shirley, the shop steward with whom Boyd argued at the union meeting of September 25. It appears that Boyd was angry because she was making 15 cents per hour less than Shirley for what Boyd considered the same work. When Boyd confronted Shirley on this question, Boyd claims Shirley accused her of trying to take her job—an unlikely accusation as Shirley enjoyed 20 years' seniority.<sup>7</sup> Miranda claims that Shirley's response to Boyd's annoyance was that Shirley "had hers made" and did not care about anyone else—not a statement that a shop steward would be likely to make to a union member at a union meeting. None of the General Counsel's other witnesses who were present—including Boyd—testified that Shirley made this statement. This testimony indicates a propensity of both Boyd and Miranda to misinterpret or distort the statements of those whom they perceive as their enemies. We conclude that they similarly distorted Lewis' statements when they testified that he fired Boyd in his office.

We also note Boyd's testimony that Miranda had obtained a petition from the Teamsters Union, calling for a representation election among Respondent's employees at its Hamilton plant. However, Miranda denied having contacted the Teamsters.<sup>8</sup>

<sup>6</sup> The agreement provided for discharge on receipt of a third warning; the record shows that Boyd had two warnings for absenteeism on her record as of September 26.

<sup>7</sup> The General Counsel's witness King denied that Shirley had accused Boyd of trying to take her job.

<sup>8</sup> Miranda responded to a question from Respondent's counsel as the General Counsel objected to it. The Administrative Law Judge sustained the objection and excluded the testimony as irrelevant; we find it relevant both as to Boyd's credibility and as bearing on Respondent's alleged

We credit Lewis' testimony that Boyd spoke of him in a profane manner on the shop floor, within the hearing of other employees. Lewis' account of this exchange rings true and is less damaging to Boyd than a concocted story. We note also that it was met only by one-word denials from the General Counsel's supporting witnesses.<sup>9</sup>

Lewis' testimony in general was straightforward, consistent with established facts, and unimpeached by cross-examination. He was not explicitly discredited by the Administrative Law Judge. We also note that in the various versions of the events of September 26 Boyd returned to the shop floor after the meeting with Lewis, where she asked her shop steward for a grievance form. This suggests, as Respondent points out, that Boyd had not been discharged at that point. If she had been, it is unlikely that Lewis would have allowed her back into the shop for fear of disrupting production.

The Administrative Law Judge improperly excluded as evidence the decision of the Ohio Bureau of Employment Services Board of Review, concerning Boyd's claim for unemployment compensation. See *Magic Pan, Inc.*, 242 NLRB 840, 841 (1979), where the Board referred to such proceedings having probative value though not conclusive. We have considered the Employment Services decision, which found that after the meeting of September 26 Lewis "instructed [Boyd] to return to work area. . . . Instead of returning to her work area [Boyd] engaged in conversation with a co-worker during which she made a vulgar reference to Mr. Lewis. The remark was overheard by Mr. Lewis who then informed [Boyd] that she was discharged." After hearing testimony from Boyd and Miranda as well as Lewis the Ohio Bureau of Employment Services Board of Review found the facts to be as Lewis had testified. We consider this evidence corroborative of Lewis' testimony in this proceeding.

In sum, we find that Lewis was a credible witness and that Boyd and Miranda were not. We accept Lewis' testimony and find that he did not fire Boyd in his office, but simply warned her against future absenteeism and told her to return to work. He then overheard her make an obscene remark on the shop floor that he understood as directed at him, constituting activity unprotected by the Act. See *Atlantic Steel Company*, 245 NLRB

motive for the discharge. See fn. 4, above. We have considered this testimony in reaching our decision.

<sup>9</sup> While Respondent's witness Rutherford related an exaggerated version of the confrontation, the version offered by the General Counsel's witness Miranda was far more incredible. Thus she claims that Rutherford, who testified for Respondent, antagonized Lewis on the day in question and that Lewis threatened to fire him.

814, 816 (1979).<sup>10</sup> For that reason Lewis discharged Boyd for insubordination and not in retaliation for any activity protected by the Act. Accordingly, we shall dismiss the complaint herein in its entirety.

#### AMENDED CONCLUSIONS OF LAW

Substitute the following for paragraph 3, and delete paragraph 4, in the Administrative Law Judge's Conclusions of Law:

"3. By discharging Nellie Boyd, Respondent did not violate Section 8(a)(3) and (1) of the Act."

#### ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the complaint be, and it hereby is, dismissed in its entirety.

MEMBER FANNING, dissenting:

I cannot find a sufficient basis in the record for reversing the credibility determinations of the Administrative Law Judge; therefore I would affirm his Decision. The majority relies on a variety of arguments, none of them substantial, for reversing the Administrative Law Judge's credibility resolutions. Chief among these is the "implausibility" of the facts as the Administrative Law Judge found them. It is, however, plausible that Supervisor Lewis, having been quite lenient with Boyd, would be angered that she threatened to file a grievance and consequently would discharge her. The evidence cited as discrediting Boyd, and her sister Miranda, relates to collateral matters and does not compel the conclusion that either witness was incredible as to the crux of the matter. The majority also relies upon the decision of the Ohio Bureau of Employment Services Board of Review, to which I would accord little weight inasmuch as that decision does not recite the evidence upon which it relies, and the record evidence considered by that board is not before us. For those reasons, I dissent.

<sup>10</sup> We note that Boyd's remark was made on the production floor, in the hearing of several employees, during working time, and was not provoked by an employer unfair labor practice. It also appears that Lewis in the preceding discussion in his office kept his temper and acted fairly during that meeting.

#### DECISION

##### STATEMENT OF THE CASE

GEORGE NORMAN, Administrative Law Judge: This case was heard in Cincinnati, Ohio, on October 15 and 16, 1980. The charge was filed by Nellie Boyd, an individual, on February 8, 1980, against Leshner Corporation, herein Respondent. The complaint and notice of hearing based on that charge was issued on March 26,

1980, by the Acting Regional Director for Region 9 for the General Counsel of the National Labor Relations Board, on behalf of the National Labor Relations Board, herein the Board, pursuant to Section 10(b) of the National Labor Relations Act, herein the Act, and Section 102.15 of the Board's Rules and Regulations, Series 8, as amended. The complaint alleges, in substance, that on or about September 26, 1979,<sup>1</sup> Respondent discharged its employee Nellie Boyd because she threatened to file a grievance against her supervisor, in violation of Section 8(a)(1) and (3) of the Act.

All parties were given full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, to argue orally, and to file briefs. Briefs filed on behalf of the General Counsel and Respondent have been carefully considered.

Upon the entire record of the case and from my observation of the witnesses and their demeanor, I make the following:

#### FINDINGS OF FACT

##### I. THE BUSINESS OF RESPONDENT

Respondent, an Ohio corporation, is engaged in the production of textile products at its place of business in Hamilton, Ohio. During the past 12 months, a representative period, Respondent, in the course and conduct of its business operations described above, purchased and received goods, materials, and products valued in excess of \$50,000 which were shipped to its Hamilton, Ohio, facility directly from points outside the State of Ohio.

I find that Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that it will effectuate the policies of the Act to assert jurisdiction herein.

##### II. THE LABOR ORGANIZATION INVOLVED

Amalgamated Clothing and Textile Workers Union, Local 148-T, herein the Union, is a labor organization within the meaning of Section 2(5) of the Act.

##### III. THE ALLEGED UNFAIR LABOR PRACTICES

###### A. Background

Respondent is an Ohio corporation which produces textile products at six plants, including its plant in Hamilton, Ohio. It employs approximately 600 workers at those plants, all of whom are represented by unions. The employees of two of the plants are represented by United Steelworkers of America. The employees at four plants including the plant at Hamilton are represented by the Union herein. The collective-bargaining agreements at all six plants contained union-security and dues-checkoff clauses.

Boyd was employed by Respondent in 1973, reemployed December 21, 1976, and worked until she was discharged on September 26. She was a packer and a member of the Union. She served as a committeewoman while working a second shift and processed grievances.

<sup>1</sup> All events herein occurred in 1979 unless otherwise indicated.

She was paid \$3.35 an hour which she believed was 15 cents under the contract rate for classification as packer. Boyd joined the strike which began on August 1, 1979, and returned to work on September 14, following the end of the strike on September 10. She walked the picket line from midnight to 4 a.m. every other day, along with other employees.

She testified that on September 25 she was ill and called in to personnel and, following the regular procedure she had used on many occasions, she reported her illness. She said she was absent because of a virus. At the time, her daughter was also ill with the same symptoms. Boyd's regular shift ended at 3:30 p.m. that day. That evening, she attended a union meeting at 7:30 p.m., even though she was not feeling well, because she felt there were important items to be discussed at the meeting. While at the meeting, Boyd entered into a discussion with employee Mary Shirley concerning Boyd's rate of pay being 15 cents an hour less than the contract rate for her classification as packer. Mary Shirley, who was a steward at the time, was also classified as a packer. Boyd was an unfinished goods packer and Shirley was a finished goods packer.<sup>2</sup> Boyd testified that her 8-year-old daughter accompanied her and that she (Boyd) was not drunk at the meeting.<sup>3</sup>

On the following morning, September 26, Boyd reported to work as usual. A short time after she arrived (approximately 8 a.m.), Supervisor Lewis went to Boyd's work station and asked Boyd why she had been absent the day before. Boyd told Lewis she was sick. Later that morning, while Lewis was making his regular rounds on the third floor, he was confronted by Chief Union Steward Mary Shirley (also financial secretary and committeewoman) who had the confrontation with Boyd at the union meeting. She accused Lewis of partiality. According to Lewis, Shirley said, "Larry, how come some people can take off without [being] given a warning and others not?" Lewis asked her to whom she was referring. She replied, "Nellie Boyd." Shirley told Lewis that the previous day, when Boyd was off, she had shown up at a union meeting drunk. She accused Lewis of letting Boyd "get away with stuff" he did not let other employees get away with. Lewis testified that, upon hearing this from Shirley, he considered that Boyd had lied to him; that she had not been sick; but had, instead, been drinking.<sup>4</sup> He felt that Boyd had made a fool of him and that it did look as though he was showing partiality towards her. He said this came on top of all the other complaints he was getting from the employees who were receiving higher paying incentive jobs, that he assigned to fill in for Boyd during her absences. They worked for much less pay while filling in for Boyd.

Following that discussion with Shirley (about 1 or 2 hours later), Lewis went to Boyd and asked her to come

to his office. While walking towards the office, Lewis saw Beatrice Miranda, Boyd's sister and the union president. Lewis asked Miranda to accompany them to his office. While the three were in the office, Lewis told them that Mary Shirley had approached him and told him that Boyd had shown up drunk at the union meeting on the day she had taken off work sick. Lewis asked her if it were true. Boyd admitted she had been to a union meeting, but denied that she was drunk. She told him she had a virus.

Lewis said he was "sick and tired" of people coming to him with complaints about what Boyd was doing and that the next time Boyd was off she was fired. He said, "if you're off another day, you'll bring a doctor's statement in or you're fired." She said, "Well, Larry, let me explain to you why I was off." He said, "I don't have to listen to you. I don't have to listen to a word you've got to say." Boyd responded, "Well, I guess then I'll have to file a grievance, and you will listen to me, because it's going over your head." At that point Lewis said, "You're fired. Clock out now." Boyd said, "I'm not clocking out. If you fired me, you clock me out." Boyd also told Lewis that he would listen because he harassed her and discriminated against her. Lewis walked out of the office and Boyd headed back to the work area to get her purse.

Soon after, Boyd told Karen Wilkerson that Lewis had fired her. They both checked Boyd's timecard and found that it had been punched out at or about 12 noon.

Peggy Murphy and Magnolia King, employees who worked within a short distance of Boyd's work station, were approached by Boyd. Boyd asked King for a grievance form. Lewis approached them and said that he had already clocked out Boyd and that such conversation should be on their own time. Employees Murphy and King both testified that Boyd did not use any profanity at that time.

#### B. Boyd's Absenteeism

Boyd testified that she received one warning for excessive absenteeism on February 15 but she denied receiving a similar warning on May 15. Beatrice Miranda, president of the Union, recalled seeing the latter warning but believed the date was inaccurate. She did not know whether Boyd received a copy of it. It is Respondent's policy that, after a 6-month period, warnings were wiped off the book and were not used against the employee concerned.<sup>5</sup> The reasons given by Respondent for Boyd's discharge are excessive absenteeism and insubordination.

#### C. Supervisor Lewis' Testimony

Supervisor Lewis' testimony corroborates that of Boyd concerning the events of September 26, except (1) the testimony of Boyd and her sister Miranda that Boyd had been fired in the office and (2) the events following the leaving of the office. Supervisor Lewis said that he told Boyd in the presence of Miranda "next time you are off, I'm going to have to insist on a doctor's excuse, or

<sup>2</sup> Respondent contends that the difference in pay is based on the "unfinished" and "finished" distinctions.

<sup>3</sup> About a week before, Boyd solicited employee signatures on a petition she circulated requesting employees to go on strike again. She asked Supervisor Larry Lewis' wife, Judy Lewis, who was also employed at the plant, to sign the petition.

<sup>4</sup> It is noted that Boyd's shift ended at 3:30 p.m. on the day that she took off from work and the union meeting did not commence until 7:30 that evening.

<sup>5</sup> Lewis admitted that his own wife also had a bad absentee record.

you're fired." He said Boyd reacted very negatively. She expressed displeasure with Lewis. She accused Lewis of discriminating against her and harassing her. Lewis cut her off and told her to get back to work, repeating that if she did not bring in a doctor's excuse she would be fired. He said Boyd left the office unhappy and Miranda came back to the office and spoke with Lewis and told him that she felt he was being fair about Boyd's absenteeism and that she (Miranda) would work with her (Boyd) to see that she corrected it. Miranda also told him that Boyd's absenteeism would improve.

Lewis said that a few minutes later he went into the plant and saw Boyd halfway between the office and her work station and heard her say angrily, "That mother f--- son of a b--- is not going to get away with it."<sup>6</sup> Lewis said that three or four people who were in the vicinity could have heard it and that two people, Bessie Marcum and Gerney Rutherford, told Lewis later that they heard it. Lewis testified that he was sure at the time that Boyd was referring to him although he admitted she could have been referring to Shirley who had earlier reported to Lewis about Boyd's attendance at the union meeting the night before.

Upon hearing that remark Lewis responded, "Well forget about the doctor's excuse. You are fired. Clock out!"<sup>7</sup>

Boyd voiced more profanity according to Lewis. He said that after he told Boyd to clock out she spoke directly to him saying that she was not going to clock out and that "no other . . . was going to clock" her out. Lewis told her he was and proceeded to clock her out. Lewis said that a few minutes later he saw Boyd at the work station of Magnolia King, a union steward, getting grievance papers from King. Lewis approached them and told Boyd that King was working and to leave her alone and that they would have to take care of it on their own time or union time. Lewis again told Boyd she was fired and to leave. Boyd left.

When Boyd came back the next day to pick up her check, she was given a letter which announced her discharge, stating,

You previously received written warnings for absenteeism. You also received four to five oral warnings regarding constant absenteeism.

Discharge is based on absenteeism and insubordination which is cause for dismissal and is a Company rule of which every employee has a copy.

Boyd filed a grievance. It was answered. There was a grievance meeting but the grievance was not processed

<sup>6</sup> In his testimony the words were pronounced and not spelled or abbreviated.

<sup>7</sup> Lewis testified that Boyd did not look at him or direct the remark at him. Gerney Rutherford, testifying on behalf of Respondent, said that Boyd directed the remark at Lewis and that they were close to each other when the remark was made. (Lewis said he was about 10 feet from Boyd when he heard the remark.) Rutherford added the word "bastard" after the word "bitch." Neither Bessie Marcum nor Mary Shirley testified. Peggy Murphy and Magnolia King testified that Boyd did not use profanity at all in that conversation.

any further by the Union.<sup>8</sup> The final decision on the grievance was that the dismissal was justified.

#### D. Discussion and Conclusions

The General Counsel argues that Nellie Boyd was discharged by Supervisor Larry Lewis on September 26, 1979, because of her union and protected concerted activities in violation of Section 8(a)(1) and (3) of the Act. The contention is based on the fact that when Boyd told Lewis that she would file a grievance against him for harassment and discrimination he discharged her. Although the facts leading up to that conduct are relevant and important the General Counsel does not contend that Boyd was discharged because she attended the union meeting the prior evening.

Respondent argues that the contention Boyd originally made, that she was discharged "because she attended a union meeting is without merit and is a deliberate twisting and perversion of what occurred by the Charging Party and her sister to try to present Boyd in a sympathy light and make Lewis look evil." I believe that Respondent in making such an argument on a matter that is not in issue in this case is merely setting up a strawman and then knocking it down. That contention was made in a charge filed by Beatrice Miranda on December 26 but, inasmuch as the charge was withdrawn prior to the issuance of the complaint in this case, it did not become a part of the complaint and for that reason was rejected when Respondent offered it in evidence.

Respondent further contends that she was discharged because she was absent on September 25 without bringing in a doctor's excuse and without, in fact, even calling in.<sup>9</sup> I do not find that she was fired as contended by Respondent, "because of excessive absenteeism and because she did not bring in a doctor's certificate." The facts in the case, even those adduced by Respondent, refute such a contention. Lewis spoke to Boyd on the morning following her absence and apparently was satisfied with her explanation without, at the time, even mentioning a doctor's certificate. It was not until after Mary Shirley complained to Lewis that Boyd was in attendance at a union meeting the night before, drunk and argumentative, and that Lewis was giving Boyd favored treatment, that Lewis called in Boyd and her sister (Beatrice Miranda) and told them that he was sick and tired of other employees complaining about his alleged favored treatment of Boyd and that the next time he would require a doctor's certificate when Boyd was absent for sickness.

As previously indicated, Boyd's workday ended at 3:30 p.m. on the day she was out sick. What she did at 7:30 that evening was none of Respondent's business. Assuming *arguendo* that Boyd did appear at the meeting drunk, it does not follow that she started drinking in the morning and continued all day when she should have been at work and appeared at the union meeting at 7:30 that evening drunk. She could have started drinking and become drunk within the 4 hours following the end of

<sup>8</sup> As previously indicated, a month before these events Boyd indicated her dissatisfaction with the Union by circulating a petition to have the Union replaced by another union.

<sup>9</sup> I credit Boyd and find that she did call in sick on the day in question.

her shift and the commencement of the union meeting whether she was absent or whether she worked on the day in question. Accordingly, Lewis' conclusion that Boyd lied to him about being sick, based on information received by him from Shirley that Boyd was "drunk" at the union meeting in the face of the denials by Boyd and Miranda, and at a time at least 4 hours after the work shift ended, is unfounded and arbitrary.

As previously indicated, I do not credit the testimony of Gerney Rutherford that Boyd used profanity and that her remarks were directed at Lewis. His testimony is inconsistent with that of Lewis. The failure to adduce testimony from either Marcum or Shirley is noted as is the testimony of Peggy Murphy and Magnolia King that Boyd *did not use any profanity* in the conversation in question. I conclude, therefore, that Lewis did not fire Boyd for using profanity (insubordination) but because of her union activity including her filing a grievance against him.

I also consider significant the fact that Boyd considered the relationship between the Union and Respondent as a "sweetheart" relationship and she made her views known by openly circulating a petition in the plant to have the Union removed as the representative of the employees in favor of another union. She was actively exercising her rights which are guaranteed under the Act. *Jack August Enterprises, Inc.*, 232 NLRB 881 (1977). There was a contract in existence between the Union and Respondent and, although Boyd did not think very much of it, she certainly had a right under that contract to file a grievance which affected the rights of all the unit employees and constituted concerted activity under the protection of Section 7 of the Act. Respondent's attempt to discourage Boyd from filing the grievance violated Section 8(a)(1) of the Act. *Interboro Contractors, Inc.*, 157 NLRB 1295 (1966).

I find that the reasons offered by Respondent for terminating Boyd are pretextual. Respondent used them in an attempt to cover up its unlawful conduct. *N.L.R.B. v. Walton Manufacturing Company*, 369 U.S. 404 (1962). Respondent contends that other employees who were involved in union activities were not terminated and therefore it should not be inferred that Boyd was terminated for her union activities. A discriminatory motive, otherwise established, is not disproved by an employer's proof

that it did not take similar action against all union adherents. *N.L.R.B. v. W. C. Nabors d/b/a W. C. Nabors Company*, 196 F.2d 272 (5th Cir. 1952), cert. denied 344 U.S. 865.

An employee has a right to file a grievance; being discharged when the employee said she was filing a grievance violates the Act. Under Section 7 of the Act employees have the protected right to file and to process grievances. *Thor Power Tool Company*, 148 NLRB 1379 (1964).

Nellie Boyd was discharged for her union activity and because she attempted to file a grievance, a protected concerted activity. Therefore, Boyd's discharge for such activity violated Section 8(a)(1) and (3) of the Act. It is well settled that punishment of an employee for attempting to file a grievance is prohibited by the Act.

#### CONCLUSIONS OF LAW

1. The Respondent, Leshner Corporation, is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. Amalgamated Clothing and Textile Workers Union, Local 148-T, is a labor organization within the meaning of Section 2(5) of the Act.
3. By discharging Nellie Boyd because of her union activities, Respondent violated Section 8(a)(3) and (1) of the Act.
4. The foregoing unfair labor practice is an unfair labor practice affecting commerce within the meaning of Section 2(6) and (7) of the Act.

#### THE REMEDY

Having found that Respondent violated Section 8(a)(3) and (1) of the Act by discharging Nellie Boyd, I shall recommend that Boyd be reinstated to her former position or, if that position no longer exists, to a substantially equivalent position, and that she be made whole for any loss of pay suffered by her as the result of the discrimination against her, as prescribed in *F. W. Woolworth Company*, 90 NLRB 289 (1950), with interest thereon to be computed in the manner prescribed in *Florida Steel Corporation*, 231 NLRB 651 (1977). See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

[Recommended Order omitted from publication.]